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Paper No. 34
JQ

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Century Mfg. Co.

Serial No. 74/451,390

Curtis B. Hamre, John A. Clifford and Kristina M. Foudray
of Merchant & Gould for applicant.

Brian Neville, Trademark Examining Attorney, Law Office 114
(K. Margaret Le, Managing Attorney).

Before Quinn, Hairston and Holtzman, Administrative
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by Century Mfg. Co. to
register the term BOOSTER PAC for "cordless rechargeable
portable power supply for automotive, home and leisure."¹
Applicant asserts that the mark it seeks to register is
inherently distinctive but, in the alternative, claims,

¹ Application Serial No. 74/451,390, filed October 21, 1993, based on an
allegation of a bona fide intention to use the mark in commerce.
Applicant asserted a second basis for filing, namely a right of
priority under Section 44 of the Act based on a Canadian application
that eventually matured into Canadian Registration No. 377,669. The
registration includes a disclaimer of the word "Booster."

pursuant to Section 2(f) of the Trademark Act, that the term BOOSTER PAC has acquired distinctiveness.

The Examining Attorney has refused registration under Section 2(e)(1) of the Act on the ground that the proposed mark BOOSTER PAC, when used in connection with applicant's goods, is generic and, thus, incapable of functioning as a source identifying mark. The Examining Attorney further contends that even if the term BOOSTER PAC is found to be not generic, it is merely descriptive. Although the Examining Attorney never specifically ruled on the sufficiency of the Section 2(f) evidence, it is apparent that he essentially found that the evidence of acquired distinctiveness is insufficient to support registration on the Principal Register.²

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney submitted briefs. An oral hearing was not requested.

The Examining Attorney maintains that the term sought to be registered is a mere misspelling of the generic term "battery pack" and, thus, is itself generic. In support of the refusal, the Examining Attorney submitted excerpts

² In maintaining the genericness refusal, the Examining Attorney simply asserted that a claim of acquired distinctiveness was unavailable to applicant.

retrieved from the NEXIS database and the Internet showing uses of "booster pack."

Applicant argues that the proposed mark is inherently distinctive and is not merely descriptive or generic. Without conceding that the term BOOSTER PAC is merely descriptive, applicant submitted an alternative claim of acquired distinctiveness. In support of its position, applicant submitted the affidavit and declaration of two of applicant's employees, with related exhibits. Also of record are several of applicant's promotional materials, and seven third-party registrations incorporating the term "booster."

The Record

We take judicial notice of the following dictionary definitions³:

booster: an electric generator inserted in series in a circuit so that it either adds to or subtracts from the voltage furnished by another source.
The IEEE Standard Dictionary of Electrical and Electronic Terms (6th ed. 1996)

booster: a generator connected in a series with a circuit for the purpose of increasing the voltage of that circuit. Generally used in connection with a system where a storage battery

³ Dictionary definitions are proper subject matter for judicial notice. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

carries part of the load. The booster increases the voltage to a point necessary for charging the battery. *Illustrated Dictionary for Electrical Workers* (2nd ed. 2002)

booster battery: a charged battery connected to a discharged battery in order to start the engine. *Delmar's Automotive Dictionary* (1997)

boost: to increase, amplify or add to, particularly at a more vigorous rate than normal, as for example in boost charging a battery. *Dictionary of Automotive Engineering* (2nd ed. 1995)

boost start: starting an engine of which the battery is discharged or feeble by applying a higher than normal voltage and current to the electrical system from an external source. *Dictionary of Automotive Engineering* (2nd ed. 1995)

pack: a compact bundle of goods or equipment arranged for convenience in carrying. *Webster's Third New International Dictionary* (unabridged ed. 1993)

Also of record are excerpts retrieved from the Internet that show, according to the Examining Attorney, generic uses, some by competitors in the trade, of the term "booster pack" in connection with goods of the type sold by applicant:

Booster Packs and Jumper Cables Available. In response to cold weather difficulties in starting vehicles, the Safety and Security Department at the Wildwood campus has booster packs and

jumper cables to assist students, faculty and staff members with this problem. The booster pack, which can be attached to your vehicle's battery to provide power to start it, may be borrowed from the Department in the event that you cannot locate another vehicle to jump your vehicle.

Harrisburg Area Community College

Safety and Security Update

(www.hacc.edu)

Midstate has

- chargers
- booster packs
- test equipment
- wire and cable
- battery boxes
- inverters

(www.midstatebattery.com)

Royal Battery Starter Alternator

Product List

Click On Category To View Products

- Batteries
- Battery Accessories
- Battery Cables
- Battery Chargers
- Battery Terminals
- Booster Packs

(www.royalbattery.com)

Don't buy those cheap, inferior knock-offs that were made for the consumer markets! This is the hand-held battery booster pack made for professional use!...The Jump-N-Carry uses only top quality components to assure you that you won't be let down when you need it most!

(www.geniproducts.com)

Jump-N-Carry-Booster Pack

Eliminates the need for booster cables.

(www.iautoparts.com)

Next we jump started (with a booster pack)...

(www.bmwseven.com)

Don't risk being stranded in the boonies. Reach for this portable/rechargeable 99-Amp Booster Pack by Clarke®.

Hook-up this zippy 900-Amp Booster Pack and you could be off and running in a flash.

(www.shop.store.yahoo.com)

The record also includes three NEXIS excerpts showing the following uses⁴: "The patrol's pickup trucks come equipped with fuel and water, jumper cables, battery booster packs, tire-changing equipment..." (*The Richmond Times Dispatch*, December 24, 1999); "The thief removed a Pioneer CD stereo player and a booster pack." (*Newsday*, February 18, 1996); and "Fishing poles and reels, a tackle box and a portable battery booster pack, total value \$350, were reported stolen from a boat dock nearby. (*Asbury Park Press*, May 15, 1996).

Applicant submitted the affidavit of Steve Bentson, applicant's president. Mr. Bentson states that applicant has made "continuous and exclusive use" of BOOSTER PAC

⁴ Several more NEXIS excerpts were introduced by the Examining Attorney. As pointed out by applicant, however, many were duplicates. And, even more significantly for purpose of our analysis, many of the articles, as critiqued by applicant, pertained to goods (e.g., computer accessories, rockets and cameras) different from the goods listed in the present application. In the final tally, only fifteen of the Internet and NEXIS excerpts are relevant to the specific issue herein.

since September 1993, and that the applied-for mark has become distinctive of applicant's goods due to applicant's sales volume and advertising. Mr. Bentson asserts that the mark is well known and closely associated with applicant, and that retailers and consumers have come to recognize the term BOOSTER PAC as a trademark identifying applicant as the source of its goods. Mr. Bentson further states that no competitor of applicant uses the term BOOSTER PAC or the like to describe or identify its goods. He also avers that applicant has marketed its products under BOOSTER PAC in a manner to educate consumers of its trademark significance, by using all capital letters and a "TM" symbol immediately after the term in printed materials, and by displaying the term in a manner to draw attention to its trademark significance. Applicant has won an award from a trade association for its product packaging. Mr. Bentson sets forth applicant's sales under the mark and advertising expenditures.

G. Robert Gey, identified as a "Director" of applicant, submitted his declaration wherein he makes many of the same statements made earlier by Mr. Bentson. In addition, Mr. Gey states that applicant is the market leader in the field of portable power supplies, and that applicant's BOOSTER PAC product has been the industry's

number-one product in unit sales for at least each of the last six years. Mr. Gey updates the sales and advertising figures set forth by Mr. Bentson. Through the years 1994-2000, applicant's total sales under the proposed mark exceed \$147 million, and advertising expenditures are approximately \$2.25 million.

The Law

We turn first to the issues of whether the term BOSTER PAC is generic, or whether it is just merely descriptive, when used in connection with "cordless rechargeable portable power supply for automotive, home and leisure." A mark is merely descriptive if, as used in connection with the goods and/or services, it describes, i.e., immediately conveys information about, an ingredient, quality, characteristic, feature, etc. thereof, or if it directly conveys information regarding the nature, function, purpose, or use of the goods and/or services. See: In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978); In re Eden Foods Inc., 24 USPQ2d 1757 (TTAB 1992); and In re American Screen Process Equipment Co., 175 USPQ 561 (TTAB 1972). The issue is not determined in a vacuum, but rather the mere descriptiveness of the mark is analyzed as the mark is used in connection with the goods and/or services. A mark is a generic name if it refers to the

class or category of goods and/or services on or in connection with which it is used. In re Dial-A-Mattress Operating Corp., 240 F.3d 1341, 57 USPQ2d 1807 (Fed. Cir. 2001), citing H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986). The test for determining whether a mark is generic is its primary significance to the relevant public. Section 14(3) of the Act; In re American Fertility Society, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999); Magic Wand Inc. v. RDB Inc., 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991); and H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc., supra. The United States Patent and Trademark Office has the burden of establishing by clear evidence that a mark is generic and thus unregistrable. In re Merrill Lynch, Pierce, Fenner and Smith, Inc., 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987). Evidence of the relevant public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers, and other publications. In re Northland Aluminum Products, Inc., 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985).

Genericness

The type of product involved here is a "booster battery" as defined in the automotive dictionary. Applicant's product, as identified in the application, is a portable power supply for various uses. These uses include jump starting (or "boost starting" as defined in the automotive dictionary) an automobile. In point of fact, jump starting automotive engines is one of the primary uses highlighted by applicant in its promotional literature. As shown by the dictionary evidence, the term "booster" is generic for a generator or battery used to increase voltage to charge a battery.⁵

The term "PAC" is the phonetic equivalent of the word "pack." The term "pack" aptly describes the nature of applicant's booster battery, that is, it is a conveniently carried compact bundle of portable power supply items.⁶ As shown by the advertising literature, applicant's product includes cables, charge level indicating lights, test switch and a power outlet. Applicant's product falls within the parameters of the dictionary meaning of "pack."

⁵ While no means dispositive of the matter, we also note that the Canadian registration of BOOSTER PAC that forms one of the bases of the filing of the application in this country includes a disclaimer of the term "booster."

⁶ Applicant's product includes a built-in handle for carrying.

Accordingly, the proposed mark BOOSTER PAC, when considered as a whole, is generic for a conveniently carried power supply pack used to boost start engines.

In reaching our decision, we acknowledge that the several examples of applicant's promotional materials are all devoid of any generic or even descriptive uses of "booster pack." Nevertheless, the record includes examples of generic uses of "booster pack" by at least four competitors in the trade. Applicant would have us conclude that these constitute infringing uses and that it was intending to write to these users (presumably cease and desist letters). Given the generic nature of "booster pack," however, it would appear that there has been no misappropriation of applicant's alleged mark. Rather, the term should be available for use by others in the trade.⁷ Further, there are generic uses in some media articles. Although applicant contends that the uses are specific references to applicant's product, there is no evidence in support of this contention.

The third-party registrations relied upon by applicant are not persuasive of a different result in this case. The

⁷ The record is devoid of any evidence that applicant even contacted the competitors or that any of them ceased using the term "booster pack" in connection with its own competing product. Even if this were the case, such actions have little relevance to the issues herein.

marks and goods are different from the ones involved here. Moreover, we are not privy to the records in the files of these registrations. We are concerned with the registrability of the specific mark for the specific goods in this case, and the determination of registrability of particular marks by the Office cannot control the result in another case involving a different mark for different goods. In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)[“Even if some prior registrations had some characteristics similar to [applicant’s application], the PTO’s allowance of such prior registrations does not bind the Board or this court.”].

We recognize that applicant uses BOOSTER PAC in a prominent manner and that the term is followed by a “TM” designation. Nevertheless, use of the “TM” designation in connection with BOOSTER PAC does not make an otherwise unregistrable term a trademark. See: In re Pennzoil Products Co., 20 USPQ2d 1753, 1760 at n. 15 (TTAB 1991).

We find that the Office has met its burden in showing by clear evidence that the proposed mark as a whole is generic. The critical evidence here that distinguishes the present case from In re Dial-A-Mattress Operating Corp., supra, is the Internet and NEXIS evidence, especially the

evidence showing competitors' generic uses of "booster pack.". Based on the record before us, we find the term BOOSTER PAC is generic for the type of power supply product sold by applicant.

Mere Descriptiveness

Even if we had not found the term BOOSTER PAC to be incapable of identifying and distinguishing applicant's goods, we nevertheless would affirm the refusal to register on the ground of mere descriptiveness. Contrary to applicant's contention that BOOSTER PAC is inherently distinctive, the term sought to be registered immediately conveys the impression that applicant's product is a compact, portable piece of equipment used as a booster to boost start a battery, especially an automotive engine battery. The evidence of record clearly shows that the term has a specific and commonly understood meaning when it is used in connection with goods of the type sold by applicant.

Acquired Distinctiveness

In finding that the term BOOSTER PAC is incapable of being a source identifier for applicant's power supply product, we have considered, of course, all of the evidence touching on the public perception of this designation, including the evidence of acquired distinctiveness. As to

acquired distinctiveness, applicant has the burden to establish a prima facie case of acquired distinctiveness. *Yamaha International Corp. v. Hoshino Gakki Co., Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988).

As indicated above, applicant submitted an affidavit and a declaration setting forth some specifics about applicant's use of its proposed mark since 1993. Applicant's total sales of the product under the involved mark exceed \$147 million, and advertising expenditures are approximately \$2.25 million.

Applicant's use and revenues suggest that applicant has enjoyed a degree of business success. In point of fact, as Mr. Gey attests, applicant's product is ranked number one in sales in the portable power supply field. Nonetheless, this evidence demonstrates only the popularity of applicant's goods, not that the relevant customers of such goods have come to view the term BOOSTER PAC as applicant's source-identifying trademark. In *re Bongrain International Corp.*, 894 F.2d 1316, 13 USPQ2d 1727 (Fed. Cir. 1990); and *In re Recorded Books Inc.*, 42 USPQ2d 1275 (TTAB 1997). The issue here is the achievement of distinctiveness and, given the generic/highly descriptive nature of applicant's term, the evidence falls short of

establishing this. Applicant's evidence is outweighed by the other evidence of record.

To be clear on this significant point, we emphasize that the record is completely devoid of *direct* evidence that *consumers* view BOOSTER PAC as a distinctive source indicator for applicant's goods.

Accordingly, even if the term BOOSTER PAC were found to be not generic, but merely descriptive, given the highly descriptive nature of the term BOOSTER PAC we would need to see a great deal more evidence (especially in the form of direct evidence from customers) than what applicant has submitted in order to find that the designation has become distinctive of applicant's goods. That is to say, the greater the degree of descriptiveness, the greater the evidentiary burden on the user to establish acquired distinctiveness. *Yamaha Int'l. Corp. v. Hoshino Gakki Co., supra*; and *In re Merrill Lynch, Pierce, Fenner & Smith, Inc., supra*. See also: *Restatement (Third) of Unfair Competition* (1993), Section 13, comment e:

The sufficiency of the evidence offered to prove secondary meaning should be evaluated in light of the nature of the designation. Highly descriptive terms, for example, are less likely to be perceived as trademarks and more likely to be useful to competing sellers than are less descriptive terms. More substantial evidence of secondary meaning thus will ordinarily be

required to establish their distinctiveness. Indeed, some designations may be incapable of acquiring distinctiveness.

Applicant's contention that it is the only one in the trade using BOOSTER PAC is not persuasive. We respond by simply saying that the designation, as used in connection with applicant's goods, is not unique in that it is not distinctive. See: In re E S Robbins Corp., 30 USPQ2d 1540, 1542-43 (TTAB 1992). As shown by the record, at least four competitors use the term "booster pack" in a generic manner, and others have referred to the type of product as a "booster pack."

In sum, the term BOOSTER PAC is a common designation used in the industry to identify goods of the type sold by applicant. The term BOOSTER PAC is generic and does not and could not function as a trademark to distinguish applicant's goods from those of others and serve as an indication of origin. The term sought to be registered should not be subject to exclusive appropriation, but rather should remain free for others in the industry to use in connection with their similar goods. In re Boston Beer Co. L.P., 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999).

Decision: The refusal to register is affirmed.